No. 95-618

Supreme Court, U.S.
FILED
OCT 13 1995
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

T.B.D., a child,

PETITIONER

vs.

STATE OF FLORIDA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE FLORIDA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

JAMES T. MILLER, ESQUIRE
Florida Bar No. 0293679
CORSE, BELL & MILLER, P.A.
233 E. Bay Street, Ste. 920
Jacksonville, FL 32202
(904) 634-1701

Counsel for Petitioner

88 pp

QUESTION PRESENTED FOR REVIEW

Whether the decision of the Florida Supreme Court upholding a statute, Section 876.18, Florida Statutes, prohibiting cross burnings is directly contrary to this Court's decision in R.A.V. v. City of St. Paul, ___ U.S. ___, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), and other state court decisions which have invalidated cross burning laws; and violates the First Amendment to the United States Constitution because it is a content-based regulation which punishes only one type of expressive conduct, instead of being a neutral law which punishes all other similar types of expressive conduct with different political messages?

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE: 3

(A) COURSE OF THE PROCEEDINGS BELOW 3

(B) STATEMENT OF FACTS 5

REASONS FOR GRANTING WRIT 5

CONCLUSION 7

INDEX TO APPENDICES

Appendix A — Decision of Florida Supreme Court on June 15, 1995. Motion for Rehearing. Order of July 27, 1995 denying Rehearing

Appendix B — Decision of First District Court of Appeal finding Section 876.18, Florida Statutes, unconstitutional on its face

Appendix C Motion to dismiss and Order of trial court granting motion to dismiss

TABLE OF AUTHORITIES CITED

Cases	Page
R.A.V. v. City of St. Paul, ___ U.S. ___, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)	1,3,4 5,6,7, 8
State v. Ramsey, 430 S.E. 2d 511 (S.C. 1993)	7
State v. Sheldon, 629 A. 2d 753 (Md. Ct. App. 1993)	7
Statutes	
United States Code	
Title 28, Section 1257	2
Florida Statutes	
Section 876.18	1,2,3 4,5,6, 7
United States Constitution	
First Amendment	2,3,4, 7

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

T.B.D., a child,

PETITIONER

vs.

STATE OF FLORIDA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

Petitioner, T.B.D, a child, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Florida Supreme Court refusing to follow this Court's decision in R.A.V. v. City of St. Paul, ___ U.S. ___, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) concerning the constitutionality of a law prohibiting cross-burning.

OPINIONS BELOW

The opinion of the Florida Supreme Court upholding Section 876.18, Florida Statutes, is reported at ___ So.2d ___, 20 Fla. L. Weekly S274 (Fla. June 15, 1995). The order denying rehearing is unpublished at this time. The opinion and order denying rehearing are set forth in Appendix A. The opinion of the First District Court of Appeal of Florida which held Section 876.18 to be unconstitutional is reported at 638 So. 2d 165 (Fla. 1st DCA 1994). This opinion is set forth in Appendix II.

JURISDICTION

The State of Florida charged Petitioner, a juvenile, with a violation of 876.18, Florida Statutes, (placing burning or flaming cross on property of another). The trial court granted a Motion to Dismiss and found Section 876.18 to be facially

unconstitutional under the First Amendment to the United States Constitution; the State of Florida appealed to the First District Court of Appeal of Florida. The First District Court of Appeal upheld the trial court and also found Section 876.18 to be facially unconstitutional. State v. T.B.D., 638 So. 2d 165 (Fla. 1st DCA 1994). The State of Florida appealed to the Florida Supreme Court. On June 15, 1995, the Florida Supreme Court reversed the decision of the First District Court of Appeal. The Florida Supreme Court denied Petitioner's Motion for Rehearing on July 27, 1995. Petitioner has timely filed the petition.

This Court has jurisdiction to review the decision of the Florida Supreme Court pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISION

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or a bridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

STATUTORY PROVISION

Section 876.18, Florida Statutes (1993)

> It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission of the owner or occupier of the premises to so do. Any person who violates this section commits a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

STATEMENT OF THE CASE

A. Course of the Proceedings Below

On August 2, 1993, the State of Florida charged Petitioner with a violation of Section 876.18, Florida Statutes (1993). Petitioner filed a Motion to Dismiss on the grounds that Section 876.18 was facially unconstitutional under the First Amendment to the United States Constitution and this Court's decision in R.A.V. v. City of St. Paul, ___ U.S. ___, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). The trial court granted the Motion to Dismiss and found that Section 876.18 was facially overbroad and unconstitutional under the First Amendment and R.A.V. v. City of St. Paul, supra. (Appendix C, Motion to Dismiss and Order Granting Motion to Dismiss.)

The State of Florida then appealed to the First District Court of Appeal of Florida. The First District Court of Appeal held that Section 876.18

was unconstitutional under the First Amendment and R.A.V. v. City of St. Paul, supra. (**See** Appendix B). The State of Florida then appealed to the Florida Supreme Court. On June 15, 1995, the Florida Supreme Court issued its opinion which upheld the constitutional validity of Section 876.18. Petitioner then filed a Motion for Rehearing which pointed out that the decision of the Florida Supreme Court directly conflicted with this Court's decision in R.A.V. v. City of St. Paul, supra. There was one dissent in the opinion by the Florida Supreme Court which agreed with Petitioner's argument that the decision in R.A.V. rendered Section 876.18 unconstitutional because it was a content-based regulation, which punished only a certain type of message - the racial or ethnic hatred associated with the burning of a cross, instead of a content-neutral law which prohibited any type of conduct on another person's property which embodied a threat

of intimidation. On July 27, 1995, the Florida Supreme Court denied the Motion for Rehearing. Petitioner then timely filed this Petition for a Writ of Certiorari.

B. Statement of Facts.

The constitutional challenge to Section 876.18 was a facial attack. Consequently, the record in this case does not include any facts except that the State of Florida alleged that Petitioner, a juvenile, was charged with erecting a flaming cross on the property of Atef Abdul-Nour in Jacksonville, Florida, on August 2, 1993.

REASONS FOR GRANTING WRIT

There is no need to grant plenary review of this case; this Court should simply summarily reverse the decision of the Florida Supreme Court because: 1) the decision of the Florida Supreme

Court directly conflicts with this Court's decision in R.A.V. v. City of St. Paul, supra; and 2) the decision of the Florida Supreme Court directly conflicts with other state decisions on the issue of the constitutionality of cross-burning laws. This Court should grant summary review to maintain uniformity in the lower courts' interpretations of this Court's decisions.

This Court has already addressed the constitutionality of cross-burning laws in R.A.V. v. City of St. Paul, supra. In R.A.V. v. City of St. Paul, this Court considered a factual situation virtually identical to this case - a juvenile erecting a flaming cross on the property of another without that person's permission. The first reason to grant review is that the Florida Supreme Court just refused to follow this Court's holding in R.A.V. v. City of St. Paul. The Florida Supreme Court misapplied this Court's holding in R.A.V. in the

following ways: (A). The Florida Supreme Court upheld Section 876.18 because it prohibited "fighting words." This Court in R.A.V. directly and unequivocally held that while a state could ban fighting words, it could not ban only certain types of fighting words. (Based upon their content). R.A.V., 112 S. Ct. at 2545. This Court in R.A.V. invalidated the City of St. Paul's cross-burning law for this precise reason. Section 876.18 is obviously a content-based (the message of Ku Klux Klan and other hate groups) prohibition of only certain types of fighting words. There is no other specific Florida Statute which prohibits all other types of fighting words.;

(B). The Florida Supreme Court erroneously held that 876.18 comported with R.A.V. because it covered any intended victim. Although this may be technically true, Section 876.18 still covers only a certain type of expressive conduct (cross-burnings)

as opposed to any other type of expressive conduct which has a message of racial or ethnic hatred. The operative fact under R.A.V. is not the intended victim, but the nature of the message and whether the law in question is a content-based regulation based upon the message, not the intended victim.; and

(C) The Florida Supreme Court also erroneously held that Section 876.18 was not overbroad because it required written permission to place a burning cross on another person's property - oral permission freely given (by a fellow member of a Ku Klux Klan group, for example) would violate Section 876.18. The Florida Supreme Court also erroneously held that Section 876.18 is not overbroad even though there are several other content-neutral laws which could prohibit the same type of conduct.

The second reason to grant this writ is that the decision of the Florida Supreme Court conflicts with the decision of the South Carolina Supreme Court in State v. Ramsey, 430 S.E. 2d 511 (S.C. 1993). The South Carolina Supreme Court reviewed a cross-burning statute virtually identical to Section 876.18. In State v. Ramsey, supra, the court held that this Court's decision in R.A.V. v. City of St. Paul, supra, made the South Carolina cross-burning statute unconstitutional. The Maryland Court of Appeals in State v. Sheldon, 629 A. 2d 753 (Md. Ct. App. 1993), also invalidated a cross-burning statute on the basis of R.A.V.. Therefore, this Court should grant review and summarily reverse the decision of the Florida Supreme Court to maintain uniformity in the lower courts' interpretations of this Court's ruling in R.A.V. Otherwise, the First Amendment has one meaning in Florida and a

different meaning in South Carolina, Maryland and the rest of the country.

CONCLUSION

Based upon: 1) the complete failure of the Florida Supreme Court to adhere to this Court's ruling in R.A.V. v. City of St. Paul, supra,; and 2) the resultant conflict between Florida and South Carolina, Maryland and the rest of the country concerning the interpretation of this Court's ruling in R.A.V. v. City of St. Paul, this Court should grant the Petition for a Writ of Certiorari.

Dated: ~~September~~ October 10, 1995.

Respectfully submitted,

JAMES T. MILLER, ESQUIRE
Florida Bar No. 0293679
CORSE, BELL & MILLER, P.A.
233 E. Bay Street, Ste. 920
Jacksonville, FL 32202
(904) 634-1701

Counsel for Petitioner

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

T.B.D., a child,

PETITIONER

vs.

STATE OF FLORIDA,

RESPONDENT

Appendix A

Decision of Florida Supreme Court on June 15, 1995. Motion for Rehearing. Order of July 27, 1995 denying Rehearing

SUPREME COURT OF FLORIDA

No. 84,013

STATE OF FLORIDA,

Appellant,

vs.

T.B.D., a child,

Appellee.

[June 15, 1995]

SHAW, J.

We have on appeal State v. T.B.D., 638 So. 2d 165 (Fla. 1st DCA 1994), wherein the district

court declared Florida's anti-burning statute, section 876.18, Florida Statutes (1993), unconstitutional. We have jurisdiction. Art. V, s. 3(b)(1), Fla. Const. We reverse.

I. FACTS

T.B.D., a minor, was charged with erecting a flaming cross on the property of Atef Abdul-Nour in Jacksonville on August 2, 1993, in violation of section 876.18, Florida Statutes (1993). The trial court held the statute unconstitutional under the First Amendment and the district court affirmed. The State appealed.

T.B.D. claims that the statute on its face violates the First Amendment because it is a content-based law prohibiting expressive conduct. He postulates that the statute violates R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), is overbroad, and is unnecessary in light of other Florida laws covering related conduct.

Chapter 876, Florida Statutes (1993), entitled "Criminal Anarchy, Treason, and Other Crimes Against Public Order," protects Florida citizens against anarchy, treason, and terrorism. Section 876.18 prohibits the placing of a flaming cross on the property of another without written permission:

> 876.18 Placing burning or flaming cross on property of another. – It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission of the owner or occupier of the premises to so do. Any person who violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

§ 876.18, Fla. Stat. (1993). Because this statute restricts expressive activity, the First Amendment is implicated.

II. THREATS AND FIGHTING WORDS

The First Amendment promotes the free flow

of ideas and information in our society by prohibiting government from restricting speech or expressive conduct because of the message expressed. See, e.g., Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989). Content-based restrictions are presumptively invalid. See, e.g., Police Dept. of Chicago v. Mosley, 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972).

Limited exceptions to this rule are allowed where the speech or expressive conduct constitutes "no essential part of any exposition of ideas, and [is] of such slight socials value as to step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942). Such speech "can, consistently with the First Amendment, be regulated because of [its] constitutionally proscribable content." R.A.V., 112 S.

Ct. at 2453. Examples of proscribable speech include defamation and obscenity. See id.

"Threats of violence" against individual citizens is one such category. Cf. Watts v. United States, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)(threats of violence against the President are outside the First Amendment). Threats of violence can be regulated because government has a valid interest in "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." R.A.V., 112 S. Ct. at 2546. "Fighting words" is another such proscribable category. Chaplinsky. These words "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id., 315 U.S. at 572.

The present statute proscribes conduct that falls within the category of "threats of violence." An unauthorized cross-burning by intruders in one's own

yard constitutes a direct affront to one's privacy and security and has been inextricably linked in this state's history to sudden and precipitous violence -- lynchings, shootings, whippings, mutilations, and home-burnings. The connection between a flaming cross in the yard and forthcoming violence is clear and direct. A more terrifying symbolic threat for many Floridians would be difficult to imagine.

The banned conduct also constitutes "fighting words." A flaming cross erected by intruders on one's property "inflicts [real] injury" on the victim in the form of fear and intimidation and also "tends to incite an immediate breach of the peace" where the victim or intruder may be inclined to take further action. See generally Chaplinsky. In the lexicon of the United States Supreme Court, it is the extraordinarily threatening mode of expression, not the idea expressed, that is intolerable. See R.A.V., 112 S. Ct. at 2548-49. Again, it is difficult to

imagine a scenario more rife with potential for reflexive violence and peace-breaching.

III. R.A.V. v. CITY OF ST. PAUL

The United States Supreme Court addressed the issue of proscribable speech in R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), where a juvenile was charged with burning a cross in a neighbor's yard in violation of a city ordinance providing:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

St. Paul, Minn. Legis. Code s. 292.02 (1990).

The United States Supreme Court held the ordinance invalid because it played favorites: Rather than proscribing certain types of "fighting words"

across the board, the ordinance prohibited such words only in special cases, i.e., only where the words may offend due to "race, color, creed, religion or gender." "Such a restriction would open the door to government favoritism and protectionism of certain topics and view-points and implicit censorship of disfavored ones . . . ." State v. Stalder, 630 So. 2d 1072, 1075 (Fla. 1994).

The present statute comports with R.A.V. because the Florida prohibition is "not limited to [any] favored topics," but rather cuts across the board evenly. No mention is made of any special topic such as race, color, creed, religion or gender. The targeted activity is proscribed because it is one of the most virulent forms of "threats of violence" and "fighting words" and has a tremendous propensity to produce terror and violence. The statute is an even-handed and neutral ban on a manifestly damaging form of expressive activity.

IV. OVERBREADTH

A statute is overbroad "if in its reach it prohibits constitutionally protected conduct." Grayned v. City of Rockford, 408 U.S. 104, 114, 92 S. Ct. 2294, 2302, 33 L. Ed. 2d 222 (1972). The overbreadth doctrine comes with a strong caveat, particularly where conduct, as opposed to pure speech, is concerned: "Application of the overbreadth doctrine . . . is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916, 37 L. Ed. 2d 830 (1973).

> [T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct -- even if expressive -- falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in

> maintaining comprehensive controls over harmful, constitutionally unprotected conduct. . . . To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Id., 413 U.S. at 615.

We conclude that T.B.D.'s overbreadth challenge to the statute must fail because the full range of conduct embraced by the statute's plain language -- the unauthorized placing of a flaming cross on the property of another -- is eminently proscribable under the First Amendment for the reasons explained above. Although one might be able to imagine a hypothetical situation wherein the statute could be impermissibly applied, the threat of overbreadth is speculative at best and is insufficiently substantial to invalidate this statute on its face:

> The concept of "substantial overbreadth" is not readily reduced to an exact

> definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. . . . In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.

City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800-01, 104 S. Ct. 2118, 2126, 80 L. Ed. 2d 772, 783-84 (1984).

V. CONCLUSION

Florida has a compelling interest in protecting the right of each of its citizens to live at peace in the sanctity of his or her home, free from violence and the threat of violence. Given this state's history and its vast cultural and ethnic diversity, we find the present statute reasonably necessary to promote the state's goals. While other Florida statutes may address unauthorized cross-burnings indirectly, e.g., via trespassing or disorderly conduct bans, those restrictions fail to confront the issue head on and to

affirmatively discourage the conduct.

The statute is a legitimate legislative attempt to protect Floridians of every stripe from a particularly reprehensible form of tyranny. The statute plays no favorites – it protects equally the Baptist, Catholic, Jew, Muslim; the Communist, Bircher, Democrat, Nazi, Republican, Socialist; the African-American, Caucasian, Haitian, Hispanic, native American, Vietnamese; the heterosexual, the male homosexual, the lesbian; the established politician, the neophyte, the activist; the author, the editor, the publisher; the artist, the curator; the teacher, the school administrator; the union organizer, the plant owner.

The statute ensures that those who exercise freedom of association or who join in robust debate on controversial issues need not fear this particular threat of violence. Although the First Amendment confers on each citizen a powerful right of self-

expression, it gives no citizen a boon to launch terrorist raids against his or her neighbor. Few things can chill free expression and association to the bone like night-riders outside the door and a fiery cross in the yard.

Based on the foregoing, we find section 876.18, Florida Statutes (1993), constitutional. We reverse the district court decision in T.B.D.

It is so ordered.

GRIMES, C.J., and KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.
OVERTON, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., dissenting.

While I would personally prefer to uphold the constitutionality of this statute and to prohibit through this statute the type of conduct at issue, I find that the United States Supreme Court's decision in R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), eliminates any choice that I

have in this matter. R.A.V. not only mandates a holding that this statute is unconstitutional but even goes so far as to explain how to draft a law that constitutionally prohibits this type of conduct. In my view, rather than attempting to uphold this statute, we should declare the statute to be unconstitutional and strongly suggest to the legislature how it can immediately draft a statute that is enforceable.

The issue in this case is not whether the State can prohibit the contemptible act of cross-burning. Clearly, it can. As noted by the district court, T.B.D. could have been charged with any number of offenses other than the one at issue, including assault, breach of the peace or disorderly conduct, criminal mischief, criminal nuisance, failure to control or report a dangerous fire, or trespass. The issue here is whether the State has prohibited cross-burning under this statute in a manner consistent with the First Amendment as interpreted

by the United States Supreme Court.

In R.A.V., the United States Supreme Court reviewed a law that was almost identical to the statute at issue here. The statute at issue in R.A.V. read as follows:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

R.A.V., 112 S. Ct. at 2541. As in the instant case, in R.A.V. the defendant had burned a cross on the private property of another. In analyzing that ordinance, the United States Supreme Court found it to be unconstitutional because it discriminated on the basis of content in that it prohibited otherwise permitted speech solely on the basis of the subject the speech addressed. Even though the statute in R.A.V. reached only those symbols or displays that

aroused "anger, alarm or resentment in others," which were otherwise characterized as "fighting words," the Court found that the prohibition of such "fighting words" could not be limited in connection with other "bias-motivated hatred" such as cross-burning. Similarly, the statute at issue in our case prohibits the "bias-motivated hatred" of burning a cross. Contrary to the majority's conclusion, it is not just the subjects to which protection is afforded that must be neutral, it also is the expressive activity itself that must be prohibited in a neutral fashion. Under the principles established by the R.A.V. decision, if the legislature were to enact a statute that proscribed all burnings and fires that are set with the intent to threaten or intimidate the owner or occupant of the property, rather than proscribing the burning of a cross, the statute would be constitutional.

I strongly suggest that the legislature examine

this matter and enact a statute in accordance with the principles directed by R.A.V. As the United States Supreme Court expressed in R.A.V., although the act of "burning a cross in someone's front yard is reprehensible," the State has "sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." 112 S. Ct. at 2550.

An Appeal from the District Court of Appeal - Statutory or Constitutional Invalidity

First District - Case No. 93-3895

Robert A. Butterworth, Attorney General; James W. Rogers, Bureau Chief - Criminal Appeals, Sonya Roebuck Horbelt, Assistant Attorney General and Gregory Durden, Chief of Civil Rights, Tallahassee, Florida,

for Appellant

James T. Miller of Corse, Bell & Miller, P.A., Jacksonville, Florida,

Appendix A

for Appellee

Ted H. Bartelstone, Miami, Florida,

Amicus Curiae for Individual Rights Foundation

Appendix A

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 84,013

STATE OF FLORIDA,

APPELLANT,

V.

T.B.D., A CHILD,

APPELLEE.

MOTION FOR REHEARING

Appellee, by and through his undersigned attorney, pursuant to Rule 9.330, Fla. R. App. P., respectfully asks this Honorable Court to rehear this cause and reconsider the opinion issued on June 15, 1995. As grounds for this motion, Appellee states:

1. This Court has overlooked the fact that the decision in this case directly conflicts with this Court's decision in State v. Stalder, 630 So. 2d

1072 (Fla. 1994). In Stalder, supra, this Court considered how the decision of the United States Supreme Court in R.A.V. v. City of St. Paul, ___ U.S. ___, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), effected Section 775.085, Florida Statutes. First, this Court acknowledged in Stalder that the State may not attempt to proscribe only certain forms of fighting words. This Court wrote:

> Even with "fighting words," however a government restriction must operate across the board and may not classify and ban only certain types of "fighting words" [citations omitted], for instance only those directed against other based on "race, color, creed, religion or gender." Such a restriction would open the door to government favoritism and protectionism of certain topics and viewpoints and implicit censorship of disfavored ones, as was the case with the St. Paul ordinance ... 630 So. 2d at 1074. (Emphasis supplied).

This Court in Stalder, supra, also noted that in R.A.V. the United States Supreme Court stated an ordinance operating across the board would have precisely the same salutary effect in combating

discrimination, but would run no risk of government favoritism and censorship. 630 So. 2d at 1075. This Court has overlooked this holding from this Court in Stalder; the holding in this case permits the type of favoritism and censorship mentioned above.

2. In Part II of the opinion, threats and fighting words, the Court writes that the State can regulate threats of violence and fighting words because of their proscribable content. Although this statement is generally true, the Court has overlooked or misapprehended the following holding by the United States Supreme Court in R.A.V. v. City of St. Paul, ___ U.S. ___, 112 S. Ct. 2538, 2543, 120 L. Ed. 2d 305 (1992):

> We have sometimes said that these categories (fighting words, obscenity, defamation) of expression are "not within the area of constitutionally protected speech," Roth, supra, 354 U.S. at 483, 77 S. Ct. at 1308; Beauharnais, supra, 343 U.S. at 266, 72 S. Ct. at 735; Chaplinsky, supra, 315 U.S. at 571-572,

> 62 S. Ct. at 768-769; or that "protection of the First Amendment does not extend" to them ... What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable conduct (obscenity, defamation, etc.) [emphasis in original] - not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. [Emphasis supplied.] Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only [emphasis in original] libel critical of the government.

3. The Court has misapprehended the above holding of the United States Supreme Court because while cross-burning and its attendant message of a threat of violence or racial hatred is proscribable, the State may not just proscribe this form of a threat of violence or racial hatred. The Court has overlooked the fact that the holding in R.A.V. v. City of St. Paul, Minnesota, supra, required a law which was not a vehicle for content-

discrimination unrelated to the proscribable content. The Court has overlooked or misapprehended the fact that the proscribable content in this case is any threat of violence - all threats of violence, not just a threat created by a burning cross.

If the general assault or battery statute only prohibited such acts by blacks or other identifiable and insular groups, then this Court would surely invalidate such a law. Section 876.18 is such a law because it selects only one type of threat of violence out of all the types of threats. The State's legitimate interest is in protecting all of its citizens from all types of threats of violence - the general laws on assault/battery or trespass/arson achieve this goal without violating the First Amendment. This Court opined that Section 876.18 directly confronts the problem of the threat of violence created by a burning cross. Although this fact may be true, this is precisely the type of content based discrimination

that the First Amendment prohibits. However, the Court has misapprehended the principle that Section 876.18, Florida Statutes, is content discrimination because it punishes only one form of a threat of violence, as opposed to a law which would prohibit all threats of violence like the example given by Justice Overton in his dissent:

"A law which proscribed all burnings and fires set with the intent to threaten or intimidate the owner or occupant of the property." The Court has overlooked the fact that under R.A.V., supra, only the type of statute described by Justice Overton would be constitutional, not Section 876.18.

4. This Court also upheld Section 876.18 on the basis that it prohibits fighting words. However, this Court has completely misapprehended the United States Supreme Court's analysis in R.A.V., supra, of this issue as it relates to cross-burning. The Court has overlooked the holding in

R.A.V. that while the State may ban fighting words, it may not ban only certain fighting words. Although the State may proscribe certain speech on one basis (e.g. fighting words), it may not then discriminate on another content-based basis. R.A.V., supra, 112 S. Ct. at 2545. The Court has overlooked the fact that Section 876.18 selects only one type of fighting words - the burning cross. The Court's opinion proves this point by its references to this State's history:

> "An unauthorized cross-burning by intruders in one's own yard constitutes a direct affront to one's privacy and security and has been inextricably linked in this state's history to sudden and precipitous violence - lynchings, shootings, whippings, mutilations and home-burnings."

Although not specifically named, the above quote obviously refers to activities of the Ku Klux Klan and other such hate groups against Afro-Americans. While the above-described history is undeniably true and Appellee does not dispute its

accuracy in any way, the Court has overlooked the fact that Section 876.18 is still a content-based law which prohibits one form of a threat of violence. The Court has overlooked the fact that if Section 876.18 is constitutional, then a law which prohibited only blacks or jews from threatening or assaulting any other person would also be constitutional.

5. This Court has overlooked the fact that its decision, by choosing to allow the State to ban, in a specific law, only certain forms of threats of violence, may actually encourage other types of violence - the individuals who commit such violence may mistakenly believe that the government endorses, or at least, is neutral or ambivalent, about that type of violence because the State has chosen to punish only certain forms of threats of violence. The Court has overlooked the fact that this possibility is precisely why the United States Supreme Court in R.A.V., supra, held that a State

must not engage in content-based discrimination even in the area of clearly proscribable speech - like obscenity or threats of violence.

The Court has overlooked the fact that the State has content-neutral laws which could ban cross-burnings; the Court has misapprehended the fact that, as Justice Overton noted in dissent (quoting R.A.V.), although the act of "burning a cross in someone's front yard is reprehensible, the State has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." The Court has overlooked the fact that Section 876.18 is not necessary - the State can punish the conduct (by the same or higher degree of crime) without a violation of the First Amendment.

6. The Court notes in Part III of the opinion that Section 876.18 comports with R.A.V., supra, because 876.18 is not limited to any favored

topic and the law is neutral because the intended victim may be anyone. This reasoning misapprehends R.A.V. and simple logic and common sense. Section 876.18 is limited to one topic - cross-burnings; although the intended victim may be anyone, the law itself selects only one form of a threat of violence.

The neutrality required by the First Amendment must cover both the message and its intended object or victim. Otherwise, the State could pass laws which prohibit acts by certain groups against anyone else. (E.g., a law which prohibited only members of the Nazi Party or other such groups from using fighting words or threats of violence, this law would be content-based discrimination and would be unconstitutional under the First Amendment.)

Section 876.18 is not neutral because it selects only one form of a threat of violence or

fighting words; the Court has overlooked the numerous examples given by the Supreme Court for content-based discrimination. See 112 S. Ct. at 2543-2549. The Court has directly overlooked the holding in R.A.V. that fighting words must encompass all forms of such words - not words, as in this case, which are certain and particular acts of violence or terror. Section 876.18 does not cover fighting words based upon other forms of bias - sexual preference, ethnicity (other forms not associated with cross-burnings), ancestry, political affiliation, appearance or other forms - words which cause injury or incite a breach of the peace.

7. This Court has overlooked the fact, as noted by Justice Overton in dissent, that the facts in R.A.V., supra, also involved the burning of a cross on private property without the owner's permission. This Court has overlooked the fact that despite this cross-burning on private property, the

United States Supreme Court sill invalidated the cross-burning law in question because it was a content-based form of discrimination and the State could easily prohibit such conduct by other content-neutral laws.

8. This Court has overlooked the fact that prosecution of the content-neutral laws discussed above coupled with Section 775.085, Florida Statutes (hate crimes statute), could punish bias-motivated crimes in a constitutional manner. See State v. Stalder, 630 So. 2d 1072 (Fla. 1994). Prosecution under a content-neutral law like trespass, assault, criminal mischief or arson would not violate the First Amendment. A subsequent penalty enhancement under 775.085 would also be constitutional under Wisconsin v. Mitchell, ___ U.S. ___, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993).

Appendix A

Respectfully submitted,

/s/ James T. Miller

JAMES T. MILLER, ESQUIRE
CORSE, BELL & MILLER, P.A.
233 E. Bay Street, Ste. 920
Jacksonville, FL 32202
(904) 634-1701

FLORIDA BAR NO. 0293679

ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been delivered, by mail, to Assistant Attorney General Jim Rogers, at the Office of the Attorney General, Department of Legal Affairs, Tallahassee, Florida, this 22nd day of June, 1995.

/s/ James T. Miller

Appendix A

SUPREME COURT OF FLORIDA

THURSDAY, JULY 27, 1995

STATE OF FLORIDA, *

*

Appellant, *

*

v. *

*

T.B.D., a child, *

*

Appellee. *

*

* * * * * * * * * * * * * * * * * *

Appellee's Motion for Rehearing filed in the above cause is hereby denied.

GRIMES, C.J., OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur

TC

cc: Hon. Jon S. Wheeler, Clerk
Hon. Henry W. Cook, Clerk
Hon. Hugh A. Carithers, Jr., Judge

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

Ms. Sonya Roebuck Horbelt
Mr. James W. Rogers
Mr. Gregory Durden
Mr. James T. Miller
Mr. Ted H. Bartelstone
Mr. Henry Mark Holzer

Appendix A

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

T.B.D., a child,

PETITIONER

vs.

STATE OF FLORIDA,

RESPONDENT

Appendix B

Decision of First District Court of Appeal finding Section 876.18, Florida Statutes, unconstitutional on its face

STATE of Florida, Appellant,

v.

T.B.D., a child, Appellee.

No. 93-3895

District Court of Appeal of Florida
First District

June 14, 1994.

Robert A. Butterworth, Atty. Gen., Sonya Roebuck Horbelt, Ass. Atty. Gen., James W. Rogers, Bureau Chief - Crim. Appeals, Tallahassee, for appellant.

Louis O. Frost, Jr., Public Defender, James T. Miller, Asst. Public Defender, Jacksonville, for appellee.

WEBSTER, Judge.

The state seeks review of an order dismissing a count of a delinquency petition which charged that appellee, T.B.D., placed on the property of another, without obtaining written permission, a burning or flaming cross, in violation of section 876.18, Florida Statutes (1993). The trial court held that section 876.18 was unconstitutional on its face

because it infringed upon rights protected by the First Amendment to the United States Constitution. We conclude that section 876.18 criminalizes a substantial amount of expression protected by the First Amendment and is, therefore, overbroad. Accordingly, we affirm.

T.B.D. was charged with a violation of section 876.18, Florida Statutes (1993), which reads:

> It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission of the owner or occupier of the premises to so do. Any person who violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

T.B.D. moved to dismiss the charge, arguing that the statute violated the free-speech portion of the First Amendment (made applicable to the states by the Fourteenth Amendment) because it was, for a

number of reasons, overbroad and, therefore, unconstitutional on its face. The trial court agreed that the statute was facially unconstitutional, relying principally upon R.A.V. v. City of St. Paul, ___ U.S. ___, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). We, likewise, agree that the statute is facially unconstitutional. However, we reach this conclusion based principally upon traditional First Amendment overbreadth analysis.

[1,2] As an initial matter, it seems to us that, notwithstanding the state's argument to the contrary, there can be little question about the fact that section 876.18 is intended to proscribe expressive conduct because of disapproval of the ideas expressed by the conduct. Nobody would seriously question the unmistakable message intended to be conveyed by those who resort to such deplorable and offensive means of communication. See e.g., R.A.V. v. City of St. Paul, ___ U.S. ___, 112 S.Ct.

2538, 120 L.Ed.2d 305 (1992) (assuming, without expressly stating, that cross burning involves expressive conduct); United States v. Hayward, 6 F.3d 1241 (7th Cir. 1993) (cross burning inevitably involves some degree of expressive conduct); State v. Sheldon, 332 Md. 45, 629 A.2d 753 (1993) (those who engage in cross burning do so intending to convey a particular message); State v. Ramsey, ___ S.C. ___, 430 S.E.2d 511 (1993) (discussing connotations historically associated with cross burning). Expressive conduct, which is intended to convey a particular message and is likely to have such an effect, has been recognized as falling within the scope of the protections afforded by the First Amendment. E.g., Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (overturning flag desecration conviction because flag burning is expressive conduct protected by the First Amendment). Government generally has greater

freedom to restrict expressive conduct than it has to restrict either the written or the spoken word. Id. at 406, 109 S.Ct. at 2540. However, it cannot proscribe particular conduct because of the message intended to be conveyed. Id. Employing such an analysis, it is clear that section 876.18 implicates First Amendment considerations.

[3,4] As a general rule, one to whom a statute may constitutionally be applied may not challenge that statute on the ground that, in other situations, the statute might be applied unconstitutionally to others. However, what is known as the First Amendment overbreadth doctrine is one recognized exception to that general rule. "The doctrine is predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to

protected expression.'" New York v. Ferber, 458 U.S. 747, 768, 102 S.Ct. 3348, 3361, 73 L.Ed.2d 1113, 1130 (1982) (citing Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634, 100 S.Ct. 826, 834, 63 L.E.2d 73, 86 (1980), and Gooding v. Wilson, 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408, 413 (1972)). Accordingly, criminal statutes which appear to infringe upon First Amendment rights "must be scrutinized with particular care." Houston v. Hill, 482 U.S. 451, 459, 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398, 410 (1987).

Recognizing that the overbreadth doctrine is "strong medicine," the Court has held that it should be used "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830, 841 (1973). As a result, "particularly where conduct and not merely speech is involved, ... the overbreadth of a statute

must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id. at 615, 93 S.Ct. at 2918. In City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800-01, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772, 783-84 (1984), the Court said:

> The concept of "substantial overbreadth" is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. On the contrary, the requirement of substantial overbreadth stems from the underlying justification for the overbreadth exception itself - the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court.... In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.

(Footnote omitted.)

[5] Applying this doctrine to section 876.18, we conclude that the overbreadth of that statute is

both "real" and "substantial." The statute is not, by its terms, limited to types of expressive conduct traditionally recognized as being entitled to little or no protection under the First Amendment. Unlike the ordinance in R.A.V. v. City of St. Paul, section 876.18 may not fairly be read as intended to be limited in its application to "'fighting' words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942). Nor may section 876.18 be read as intended to be limited in its application to "advocacy [which] is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430, 434 (1969). Rather, the statute also clearly proscribes expressive conduct which, however odious the intended

message might be to the overwhelming majority, is, nevertheless, protected by the First Amendment. As the Court noted in Terminiello v. City of Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131, 1134 (1949):

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute ..., is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Similarly, but more recently, overturning a conviction for flag desecration, the Court has said that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. at 414, 109 S.Ct. at 2545. See also Brandenburg v. Ohio,

395 U.S. 444, 89 S.Ct. 1827 (overturning conviction under criminal syndicalism statute for conduct and speech at Ku Klux Klan rally).

The following is offered, by way of illustration only, as one situation in which enforcement of section 876.18 would proscribe expressive conduct protected by the First Amendment: Suppose a group, such as the Ku Klux Klan, were holding a rally upon property owned by one of its members in a rural area where surrounding property owners were likewise members (or otherwise in sympathy with that organization's views) and, with the intent to communicate disagreement with the policies (whether real or perceived) or government regarding race relations (or religious freedom), burned a cross. Suppose, further, that, whether by design or by pure happenstance, a law enforcement officer who found such conduct offensive drove up just as the cross was being lit, and decided to arrest those

responsible for lighting the cross for violating section 876.18. As written, notwithstanding the fact that the rally was taking place upon the property of a member who had, at least tacitly, given his approval to the events taking place, those charged would be subject to conviction unless they had "first obtain[ed] written permission of the owner" of the property to burn the cross. Neither oral permission nor lack of any malicious intent could be raised as a defense, given the plain wording of the statute.

While merely one example, we believe that the foregoing is sufficient to demonstrate that the likelihood that fear of criminal prosecution under the statute will have a chilling effect on the exercise by those not before the court of expressive conduct protected by the First Amendment is both "real" and "substantial." Accordingly, we conclude that section 876.18 violates the First Amendment overbreadth doctrine and is, therefore, unconstitutional. See

R.A.V. v. City of St. Paul, ___ U.S. ___, ____ __ ____, 112 S.Ct. 2538, 2550-60 (White, J., concurring) (arguing that ordinance should have been declared unconstitutional based upon overbreadth doctrine, notwithstanding narrowing, "fighting words," construction of Minnesota Supreme Court).

[6] Although we decide this case based principally upon the First Amendment overbreadth doctrine, we note that the outcome would be the same were we to conclude that the statute was susceptible to some type of narrowing construction, thereby requiring application of the analysis used in R.A.V. v. City of St. Paul. There, the Court noted that it was bound by the Minnesota Supreme Court's construction limiting the ordinance's reach to "only those expressions that constitute 'fighting words.'" Id. at ___, 112 S.Ct. at 2542. Notwithstanding that narrowing construction, however,

the Court concluded that the ordinance was facially unconstitutional because it proscribed only "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender,'" while permitting other types of "fighting words," "containing abusive invective, no matter how vicious or severe" (id. at ____, 112 S.Ct. at 2547), thereby discriminating based upon the content of the expression, rather than the mode (id. at ___ __ ___, 112 S.Ct. at 2548-49); and because "content discrimination [was not] reasonably necessary to achieve St. Paul's compelling interests." Id. at ___, 112 S.Ct. at 2550.

Were we able to conclude that section 876.18 was susceptible to a construction limiting its reach to only "fighting words" or to conduct intended (and likely) to incite imminent lawlessness, we would be constrained to conclude, further, that the statute was, nevertheless, unconstitutional on its face

pursuant to R.A.V. v. City of St. Paul because (1) section 876.18 proscribes only one type of such conduct, based upon the content of the message; and (2) such content discrimination is not necessary to further the legitimate interest sought to be promoted by the statute. On the contrary, as was true in R.A.V. v. City of St. Paul (id. at ____, 112 S.Ct. at 2541), here T.B.D. might conceivably have been charged for his actions with any of a number of other offenses, including assault (s. 784.011, Fla.Stat.), breach of the peace or disorderly conduct (s. 877.03, Fla.Stat.), criminal mischief (s. 806.13, Fla.Stat.), criminal nuisance (s. 823.01, Fla.Stat.), failure to control or report a dangerous fire (s. 877.15, Fla.Stat.) or trespass (ss. 810.08, 810.09, Fla.Stat.); and the penalty might have been enhanced if the commission of the offense "evidence[d] prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, or

national origin of the victim." s. 775.085, Fla.Stat.

We share, wholeheartedly, the Supreme Court's "belief that burning a cross in someone's front yard is reprehensible." Id. at ___, 112 S.Ct. at 2550. We do not mean to suggest by this opinion that conduct such as that with which T.B.D. was charged should be condoned, or left unpunished. We hold only that such conduct may not be proscribed by a statute which infringes significantly upon rights protected by the First Amendment.

AFFIRMED.

KAHN and DAVIS, JJ., concur.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

T.B.D., a child,

PETITIONER

vs.

STATE OF FLORIDA,

RESPONDENT

Appendix C

Motion to dismiss and Order of trial court granting motion to dismiss

NCA: 10/5/93

IN THE CIRCUIT COURT
OF THE FOURTH JUDICIAL
CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO.: 93-4663 CJA

DIVISION: JV-C

IN THE INTEREST OF

THOMAS DAVIS,

A CHILD.

MOTION TO DISMISS

Comes now the Child, THOMAS DAVIS, by and through the undersigned attorney, the Public Defender for the Fourth Judicial Circuit of Florida, pursuant to Rule 8.085 (a)(2) Florida Rules of Juvenile Procedure and moves this Honorable Court to dismiss the petition in this case.

I. Thomas Davis, a Child, is charged with Burning a Cross on the Property of Another, pursuant to Section 876.18, Florida Statutes.

Section 876.18 provides that:

> It shall be unlawful for any person or persons to place or cause to be placed on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission of the owner or occupier of the premises to do so. Any person who violates this section commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

II. Section 876.18 is unconstitutional on its face and violates the First and Fourteenth Amendments to the United States Constitution and Article I, Section 4 of the Florida Constitution because:

A. The statute is overbroad and violates free speech rights because it is not content neutral - it does not ban the burning of all items on the property of another. It prohibits only the burning of a cross. This content-based regulation violates the holding of the United States Supreme

Court in R.A.V. v. City of St. Paul, Minnesota, 112 S. Ct. 2538 (1992).

B. The statute is also overbroad because it prohibits the simulated burning of a cross. A simulated burning of a cross could include a photograph or painting of such a cross. The State of Florida lacks significant interest in the enforcement of such a law to outweigh the exercise of First Amendment rights.

C. Section 876.18 is overbroad because the State can enforce other content-neutral laws which prohibit trespass, criminal mischief, or the open burning of objects without a permit or supervision. See Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L.Ed. 2d 342 (1989); R.A.V. v. City of St. Paul, Minnesota, supra at 2544. The enforcement of these laws would achieve any legitimate state interest in the protection of property. The obvious attempt of the state to prohibit racial

hate crimes, while laudable, is presumptuously unconstitutional because the First Amendment prohibits the proscribing of speech and expressive conduct based upon the disapproval of the ideas expressed. See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board, 112 S. Ct. 501(1991); Consolidated Edison Co. of N.Y. v. Public Service Commission of N.Y., 447 U.S. 530, 100 S. Ct. 2326, 652 L.Ed 2d 379 (1980). Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S. Ct. 2286, 33 L.Ed 2d 212 (1972).

D. The State of Florida can possibly punish the conduct in this case by a content-neutral law. However, Section 876.18 patently prohibits only one specific type of the burning of an object on the property of another: A cross. This statute was obviously aimed at prohibiting a certain type of message from adherents of the ideas/methods of the Ku Klux Klan. Although those ideas and

methods are morally repugnant, a free society which cherishes and protects free speech cannot countenance the use of a law which prohibits only the message of the Ku Klux Klan or its affiliates. See Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L.Ed 661 (1989). (Time, place, and manner restriction would be valid if it was justified without reference to the content of the regulated speech); Carey v. Brown, 447 U.S. 455, 100 S. Ct. 2286, 65 L.Ed 2d 263 (1980).

WHEREFORE, this Court should dismiss the petition for a violation of Section 876.18 because it is unconstitutional on its face.

I HEREBY CERTIFY that a copy of the above and foregoing Motion to Dismiss has been furnished to the Office of the State Attorney, by hand, this 30 day of September, A.D. 1993.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

BY: /s/ Donald B. Jaffe
Donald B. Jaffe 0361348
Assistant Public Defender

/tlp

IN THE CIRCUIT COURT
OF THE FOURTH JUDICIAL
CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO.: 93-4663-CJA
DIVISION: JV-C
S.A. NO.: 93-279468

IN THE INTEREST OF:

DAVIS, THOMAS BRANDT,

A Child.

_____/

ORDER GRANTING MOTION TO DISMISS

I

THIS CAUSE came on for hearing upon the Motion to Dismiss the Petition of Thomas Davis, a Child ("the Child") filed on September 30, 1993. The Child was arrested and charged with Burning a Cross on the Property of Another pursuant to s. 876.18, Fla. Stat. In support of his Motion to Dismiss, the Child asserts that s. 876.18, Fla. Stat. is unconstitutional on its face under the First and

Fourteenth Amendments to the United States Constitution since the statute is impermissibly content-based and overbroad. This Court agrees.

II

The First Amendment generally prohibits the government from proscribing speech or expressive conduct because of disapproval of the ideas expressed. R.A.V. v. City of St. Paul, Minnesota, 505 US__, 112 S. Ct. 2538, 2542, 120 L.Ed.2d 305, 317 (1992). Such content-based regulations are presumptively invalid. Id.

A challenge to a statute on First Amendment grounds requires first a consideration of whether the speech or conduct is protected by the United States Constitution. Clean-Up '84 v. Heinrich, 759 F.2d 1511, 1513 (11th Cir. 1985) [citing City Council v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct.. 2118, 80 L.Ed.2d 772 (1984)]. This Court must determine whether the Child's burning of a cross

constituted expressive conduct allowing him to invoke the First Amendment in challenging his prosecution.

Whenever the person engaging in conduct intends to express an idea, the Supreme Court has acknowledged that such conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342, 353, (1989). In determining whether particular conduct possesses sufficient communicative elements entitling such conduct to First Amendment protection, the Court must consider whether an intent to convey a specific message was present and whether the likelihood was great that the message would be understood by those who viewed it. Id. This Court finds that the Child was engaging in expressive conduct entitled to First Amendment

protection. See, R.A.V. v. City of St. Paul, supra.

In contrast to restrictions on the spoken or written word, the government generally has a freer hand in restricting expressive conduct. Texas v. Johnson, supra, 491 U.S. at 406, 109 S.Ct. at 2540, 105 L.Ed.2d at 354-355. Nonetheless, the government may not proscribe particular conduct because it has expressive elements. Id.

This Court must now determine whether the State's regulation is related to the suppression of free expression. Texas, supra, 491 U.S. at 403, 109 S.Ct. at 2538, 105 L.Ed.2d at 352 [citing U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)]. If the State's regulation is unrelated to expression, the less stringent standard announced in U.S. v. O'Brien for non-content based regulations controls. Id. Where the government's regulation is related to expression or the individual's speech is restricted because of its content, the State's

asserted interest behind the regulation must be subject to the "most exacting scrutiny". Texas, supra, 491 U.S. at 412, 109 S.Ct. at 2543, 105 L.Ed.2d 342, 359.

This Court recognizes that the Supreme Court has permitted restrictions upon the content of speech in a few limited areas, such as defamation, obscenity and fighting words, since they generally have no real First Amendment value. R.A.V. v. City of St. Paul, 505 US__, 112 S. Ct. at 2543, 120 L.Ed.2d at 317. [1] However, the City of St. Paul

---

1 In Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed 1031 (1942) the Supreme Court stated: There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting words"--those which by their very utterance inflict injury or tend to incite an immediate breach of peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

case recedes from this strict categorization of speech under the First Amendment. [2] As that court explains, these categories of speech can, consistently with the First Amendment, be regulated because of their constitutionally prescribable content, but they are not "entirely invisible to the Constitution." City of St. Paul, 505 US__, 112 S. Ct. at 2543, 120 L.Ed.2d at 318. The government may not regulate those areas based on hostility, or favoritism, towards the non-proscribeable underlying message expressed. City of St. Paul, 505 US__, 112 S. Ct. at 2545, 120 L.Ed.2d at 320.

The essence of this line of cases is that nonverbal expressive activity can be banned because of the action in entails, but not because of the ideas it expresses. Thus, burning a flag in violation

---

2 **Moreover, the State has not attempted to classify the instant expressive conduct into one of the traditionally unprotected categories.**

of an ordinance against outdoor fires is punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. City of St. Paul, 505 US__, 112 S. Ct. at 2544, 120 L.Ed.2d at 318 (citing Texas v. Johnson, 491 U.S. at 406-406, 404, 109 S.Ct. at 2540-2541). Likewise, burning a cross on the property of another in violation of a statute against outdoor fires or trespass would be punishable. However, the burning of a cross in violation of a statute against racist motivated conduct is not.

In City of St. Paul, the Supreme Court struck a city ordinance under which a juvenile had been prosecuted for burning a cross on a black family's lawn. The ordinance prohibited placing any symbols anywhere in the City of St. Paul which one knew or had reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." City of St. Paul, 505 US

__, 112 S. Ct. at 2541, 120 L.Ed.2d at 315 Id., at S. Ct. 2540. The ordinance was only directed at what was construed to be constitutionally unprotected "fighting words." It was still found to be unconstitutional, though, because its content-based discriminations were not justified by the City's asserted interest. City of St. Paul, 505 US __, 112 S. Ct. at 2550, 120 L.Ed.2d at 326.

The ordinance in City of St. Paul imposed special prohibitions on speakers who expressed views on the disfavored subjects of race, color, creed, religion or gender. City of St. Paul, 505 US __, 112 S. Ct. at 2547, 120 L.Ed.2d at 323. However, the ordinance permitted displays containing abusive invective arousing anger, alarm or resentment if they were not addressed to those topics. In other words, the ordinance, prohibiting certain types of "fighting words," but not others, was content-based:

> Displays containing abuse investive, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas - to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality - are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

Id.

The instant statute creates a first-degree misdemeanor for placing a burning or flaming cross on the property of another. The substantive portion of the statute reads:

> It shall be unlawful for any person or persons to place, or cause to be placed, on the property of another in the state a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or part without first obtaining written permission of the owner or occupier of the premises to so do.

Section 876.18, Fla. Stat. This statute, like the statute in City of St. Paul, is aimed at messages

based upon bias and messages based upon ideas of racial supremacy. The burning of a cross is a distinct symbol of the Klu Klux Klan which expresses that group's intolerance for racial equality and their hatred for certain minorities. The statute is aimed at proscribing and punishing the expression of such ideas because the government deems them offensive. The instant statute proscribes the Child's expressive conduct because of the content of the message conveyed. The government may not prohibit the expression of an idea simply because society finds the idea repugnant. Thus, the statute is presumptively unconstitutional and may only be sustained if it is necessary to serve a compelling governmental interest.

The State argues that the Florida statute (unlike the Minnesota ordinance in City of St. Paul) does not prohibit all cross burning. Instead, it only

regulates the place at which crosses may be burned by prohibiting the same "on the property of another," unless written permission is given for the act. The State asserts that the statute, in referencing "the property of another," should be construed as only regulating cross burning on private property. In particular, the State points out that it has a legitimate interest in regulating, or even prohibiting, otherwise constitutionally protected speech when such speech is focused on a single residence. Frisby v. Schultz, 487 U.S. 474, 108 S.Ct. 2495, 101 L. Ed.2d 420 (1988) (upholding a prohibition on picketing at the residence or dwelling of an individual). However, the State ignores the fact that even in regulating the place of expression, a statute must be content neutral.

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without

> reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed.2d 221, 227 (1984) (emphasis added). See Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed.2d 661 (1989). Indeed, even in Frisby, supra, the city had originally acted on legal advice to strike a previous ordinance that had prohibited all residential picketing except for labor picketing. The ordinance addressed by the Supreme Court in the case dealt simply with all types of picketing, without regard to the content of the picketing. Frisby v. Schultz, at 101 L. Ed.2d 426.

The State also argues that the recent Supreme Court Opinion in Wisconsin v. Mitchell, 508 U.S. ___, 113 S. Ct. ___ 124 L. Ed.2d 436 (1993), supports its position. That case upheld a statute

enhancing criminal penalties for so-called hate crimes. It did not, however, enhance penalties for commission of the same crimes when the victim had not been selected because of race, religion, color, disability, sexual orientation, national origin or ancestry. In other words, the Supreme Court upheld a statute which was content-based.

The State can take no solace from Wisconsin v. Mitchell, however, because the Court decided that the statute in question was not dealing with expression to begin with. Instead, the statute only dealt with conduct which never enjoyed any First Amendment protection. Id., at L. Ed.2d 447. The same cannot be said for cross burning, which, though morally repugnant, enjoys a modicum of constitutional protection as symbolic expression. See, City of St. Paul, Minnesota, supra.

It is important to consider that the existence of adequate content-neutral alternatives significantly

undercuts any defense to a content-based statute. City of St. Paul, 505 US__, 112 S. Ct. at 2550, 120 L.Ed.2d at 326. There exist amply content-neutral alternatives in the instant case. The Florida Legislature could have regulated the instant activity by simply prohibiting the burning of any object on the property of another without written permission. Moreover, the alleged activity might also be controlled by s. 810.09, Fla. Stat. (prohibiting trespassing) or s. 806.13, Fla. Stat. (prohibiting criminal mischief). Instead, the Legislature has sought to regulate the conduct of cross-burning, but not that of burning, for instance, a swastika.

The particular means by which the Legislature has chosen to promote its interest, through Section 876.18, Fla. Stat., cannot stand in light of the First Amendment. This Court does not overlook the State's substantial interest in racial equality, domestic tranquility and the protection of minorities from

hostile and offensive conduct. However, the State may not further its interests through the disapproval and prohibition of the expression of particular ideas. The instant statute's content discrimination is not narrowly tailored to serve the State's interest. A statute not directed to the particular disfavored subject of cross-burning would have the same beneficial effect. City of St. Paul, 505 US___, 112 S. Ct. at 2550, 120 L.Ed.2d at 326. "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." City of St. Paul, 505 US___, 112 S. Ct. at 2548, 120 L.Ed.2d at 324.

It is, thereupon,

ORDERED AND ADJUDGED:

1. The Child's Motion to Dismiss the Petition is hereby **GRANTED**.

DONE AND ORDERED at Jacksonville, Duval

County, Florida, this 3rd day of November, 1993.

/s/ Hugh A. Carithers, Jr.
Hugh A. Carithers, Jr.
Circuit Judge